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# Supreme Court of The United States

October Term, 1958

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No. 249

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ALBERT E. PERRY,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

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## BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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### OPINION BELOW

The Opinion of the Supreme Court of North Carolina is reported as 250 N. C. 119, 108 S. E. 2d 447, and the same Opinion is copied in the Appendixes to the Petition for Certiorari in this case, beginning on p. 24. The Judgment of the Supreme Court of North Carolina appears as Appendix A on p. 23 of the Appendixes attached to the Petition in this case. The Judgment of the Superior Court of Stanly County, the Trial Court, appears in Appendix C on p. 65 of the Appendixes attached to the Petition in this case.

The Supreme Court of North Carolina passed on this case prior to the Opinion cited above and reversed the case in favor of the Petitioner upon the basic ground that the Peti-

tioner had not been given a reasonable time and opportunity to investigate the matter of racial discrimination in the organization of the grand jury (see: STATE v. A. E. PERRY, 248 N. C. 334, 103 S. E. 2d 404—see also: State Record No. 433 at p. 3).

## JURISDICTION

The Petitioner invokes the jurisdiction of this Court pursuant to 28 USC 1257(3), 2101(d), and pursuant to Rule 22(1) of the Revised Rules of the Supreme Court of the United States.

## QUESTIONS PRESENTED

The Respondent, State of North Carolina, submits that there is but one fundamental and basic question involved in this case, or Petition, and that it should be stated as follows:

Has the Petitioner shown, under the facts in this case, that persons of the colored race were arbitrarily, intentionally and systematically excluded from jury service in the selection of the Grand Jury of Union County, which returned the Bill of Indictment against the Petitioner?

This is stated by the Petitioner in different language in his Question No. 4 on p. 15 of his Petition. The other questions submitted by the Petitioner simply represent evidentiary phases of unconstitutional discrimination in the selection of juries.

## STATUTES INVOLVED

The Petitioner submits as to State statutes the following: Secs. 9-24, 9-25 and 9-26 of the General Statutes of North Carolina, and these are copied in Appendix D, p. 102 of the Appendixes attached to the Petition. The Respondent, State of North Carolina, is satisfied with this designation of the statutes involved and agrees that the Fourteenth Amendment to the Constitution of the United States is invoked by the Petitioner.

## STATEMENT

The Petitioner was originally indicted by the Grand Jury of Union County, North Carolina, on a charge of Abortion (State Record, p. 3—Appendix C, p. 42 of Appendixes attached to Petition). The Petitioner was first tried in the Superior Court of Union County, the trial beginning approximately on October 30, 1957, and the trial panel of 12 persons consisted of 10 white jurors and two Negro jurors. The Counsel for the Petitioner in this trial filed a Motion to Quash and Dismiss the Bill of Indictment upon the ground that members of the Negro race had been systematically excluded from Grand Jury service in Union County. These Motions were overruled, and the Petitioner was tried and convicted, and upon appeal to the Supreme Court of North Carolina that Court reversed the case for the reason that the Petitioner and his Counsel were denied by the Trial Court a reasonable opportunity and time to investigate the matter of racial discrimination (see: STATE v. A. E. PERRY, 248 N. C. 334, 103 S. E. 2d 404). Thereafter, upon motion of Counsel for the Petitioner (State Record, p. 4—Appendix C, p. 45 of Appendixes attached to Petition), the case was transferred to Stanly County for trial (see: State Record, pp. 9, 10—Appendix C, p. 52 of Appendixes attached to Petition).

When the case was called for trial in the Superior Court of Stanly County the Petiitoner in apt time interposed a Motion to Quash and Dismiss the Bill of Indictment upon the ground that the Grand Jury of Union County, which returned the Bill of Indictment, had been unconstitutionally organized because of systematic exclusion of colored persons from Grand Jury service (State Record, pp. 25, 26—Appendix C, pp. 53, 54, of Appendixes attached to Petition). The Trial Judge heard the evidence of Petitioner on the issue of discrimination in the organization of the Grand Jury, made findings of fact and overruled the Motion to Quash the Bill of Indictment (State Record, pp. 17, 18—Appendix C, pp. 61, 62, of Appendixes attached to Petition). The Petitioner reserved exceptions, was tried and convicted and again appealed to the Supreme Court of North Carolina, which Court affirm-

ed the Judgment of the Trial Court (STATE v. A. E. PERRY, 250 N. C. 119, 108 S. E. 2d 447). The Petitioner is a Negro physician, and the woman upon whom it was charged that the abortion was performed is a white woman. The Court will note from the State Record that the Petitioner did not object to the trial panel of jurors which convicted him, nor did he object to the method of their selection and organization.

## ARGUMENT

The Respondent omits any statement of facts or review of the evidence as to the actual trial of the Petitioner on the charge of abortion for which he was convicted. This is so because the Petitioner has not raised any question of a constitutional nature as related to his actual trial but simply contends that the Bill of Indictment is invalid because of unconstitutional discrimination in the organization of the Grand Jury which returned the Bill of Indictment in Union County.

### THE PETITIONER HAS NOT SHOWN UNDER THE FACTS IN THIS CASE THAT PERSONS OF THE COLORED RACE WERE ARBITRARILY, INTENTIONALLY AND SYSTEMATICALLY EXCLUDED FROM JURY SERVICE IN THE SELECTION OF THE GRAND JURY OF UNION COUNTY, WHICH RETURNED THE BILL OF INDICTMENT AGAINST THE PETITIONER.

Before dealing with the factual matters relating to this case we assert that several propositions have been established in the field of alleged discrimination as related to jury selection as measured by the Fourteenth Amendment:

(1) Petitioner is not entitled, as a matter of constitutional right to be indicted or tried by a jury which contains proportional representatives of the white and colored races, nor is he entitled to be indicted or tried by a jury composed in part of members of his own race or class (MARTIN v. TEXAS, 200 U. S. 316, 50 L. ed. 497).

(2) Colored persons eligible for jury duty are entitled to have their names in the jury box and where, as in this case, the names are drawn by chance, they are entitled to have their chance to serve on the Grand Juries and Trial Juries of the County on the same basis as white jurors. Petitioner is not to be deprived by design of the chance of having colored persons on the Grand Jury or Trial Jury (MARTIN v. TEXAS, supra; STRAUDER v. WEST VIRGINIA, 100 U. S. 303, 25 L. ed. 664; NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074; HOLLINS v. OKLAHOMA, 295 U. S. 394, 79 L. ed. 1500; HALE v. KENTUCKY, 303 U. S. 613, 82 L. ed. 1050; PIERRE v. LOUISIANA, 306 U. S. 354, 83 L. ed. 757; SMITH v. TEXAS, 311 U. S. 128, 85 L. ed. 84).

(3) The conduct that is condemned in the administration of a jury system is "purposeful discrimination," or, as expressed in other words, "long continued, unvarying and wholesale exclusion of Negroes from jury service" (AIKENS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692; NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074).

(4) It is not enough to simply show that there were no Negroes on the Grand Jury but the burden is on the Petitioner to show an alleged discrimination in the selection of Grand Jurors or Trial Jurors (AIKENS v. TEXAS, supra; MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87; FAY v. NEW YORK, 332 U. S. 261, 91 L. ed. 2043).

(5) Former errors in the selection of a grand jury or trial jury cannot invalidate future trials; the problem is whether or not Petitioner was indicted by a grand jury because names of jurors were selected by discriminating against Negroes solely on account of race and/or color. It is the particular administration and organization of the Grand Jury which returned a bill of indictment against Petitioner which is decisive (BROWN v. ALLEN, 344 U. S. 443, 97 L. ed. 469; CASSELL v. TEXAS, 339 U. S. 282, 290, 295, 94 L. ed. 839, 848, 851).

(6) A nondiscriminatory use of the tax list, which fairly

includes the white and colored races, does not violate the Fourteenth Amendment (BROWN v. ALLEN, supra).

(7) This Court has said in substance that a great deal of decisiveness must be given to the determination, on this question, made by the trial court and by the appellate court (THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512).

(8) There is a presumption that officers in charge of the selection of members of a grand jury or a trial jury have performed their duties fairly and justly without discrimination against any race or class (TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572).

(9) Where the population ratio of Negroes is small as compared to the white race it is unsafe to attach too much significance to any law of recurrences in determining arbitrary discrimination (SWAIN v. STATE, 250 Ind. 259, 18 N. E. 2d 921, 926).

(10) Fairness in selection does not require proportional representation of races upon a jury (AIKENS v. TEXAS, supra; THOMAS v. TEXAS, supra; VIRGINIA v. RIVES, 100 U. S. 313, 25 L. ed. 667).

(11) On questions of jury discrimination the Supreme Court of North Carolina follows the decisions of this Court (STATE v. PEOPLES, 131 N. C. 784, 42 S. E. 814; STATE v. SPELLER, 229 N. C. 67, 47 S. E. 2d 537; MILLER v. STATE, 237 N. C. 29, 74 S. E. 2d 513, cert. den. 345 U. S. 930, 97 L. ed. 1360).

THE EVIDENCE AS TO JURY DISCRIMINATION IN THIS CASE.

Petitioner in his argument in this Petition attempts to increase the ratio of colored population as related to the white population in Union County by the use of United States Census Reports. We would call to the Court's attention that in the trial of this case Counsel for the Petitioner and the

Prosecuting Attorney for the State of North Carolina stipulated that the percentage of Negroes in Union County, as related to the white population, was 12-1/2% (see State Record, pp. 56, 57-Appendix C-p. 95 of Appendixes attached to this Petition). Furthermore, the Trial Judge found as a fact: "that adult Negroes constitute approximately 12-1/2% of the total adult population of Union County, North Carolina." (State Record, p. 62-Appendix C-p. 100 of Appendixes attached to Petition). If this Court will examine the exceptions of Petitioner to Findings of Fact in Order Overruling Motion to Quash, this Court will see that Counsel for the Petitioner did not file any objection or exception to the above-quoted finding of fact (State Record p. 63). This fact was noted by the Supreme Court of North Carolina in its Opinion (STATE v. A. E. PERRY, 250 N. C. 119, 108 S. E. 2d 447) and in this connection the Supreme Court of North Carolina said: "Defendant neither excepts to, nor assigns as error, the Finding of Fact No. 2 'that adult Negroes constitute approximately 12-1/2% of the total adult population of Union County, North Carolina.'" As to population ratios, therefore, the case should be passed upon the basis of 12-1/2% as colored because this ratio was used before the Supreme Court of North Carolina without objection or exception.

A few excerpts from the evidence in this case will show that there has been no long-continued, unvarying and wholesale exclusion of Negroes from jury service in Union County, and, therefore, the extreme cases cited by Petitioner have no application to this case.

J. Hampton Price, Clerk of the Superior Court of Union County for nine years, and prior to that County Tax Collector of Union County for about 13 years, among other things testified as follows: "I have the jury book with me covering the period from 1945 up to the present. I think the Minutes of the Court take care of the jury up until that time. I have the Minute Docket Book of the Court back to 1936 **** Ike Montgomery, a Negro, was on the Grand Jury in 1954. Lex Houston, a Negro, was on the Grand Jury in 1958. There were

other Negroes in the panels, but when you are drawing them by lot it is not always possible to get a Negro on the Grand Jury, due to the small ratio between Negroes and whites in Union County."

B. F. Niven, County Tax Collector of Union County for eight years, and prior to that Deputy Sheriff of the County for four years, and Sheriff of the County for 16 years, testified, among other things, as follows: (The Witness testified from records and ledgers covering 21 or 22 years as to the number of whites and the number of Negroes in the nine townships of Union County for a number of different years—see State Record pp. 37, 38, 39, 40, 41) "I cannot say that any Negroes were on the Grand Jury during my term. They were on the regular panel but the Grand Jury is selected out of the regular panel in the Courtroom in the presence of the Court by a child out of a hat. The whole panel is in there."

Roy J. Moore, Tax Accountant and Tax Supervisor of Union County since May 15, 1935, testified, among other things, as follows: "He is Clerk to the Board of County Commissioners of Union County. He helps prepare the jury lists. The jury lists are prepared every two years from the tax scroll for men, both Negroes and whites. He gets the names of women, both Negroes and whites, from the precinct lists. About 10% of the names placed in the jury books are women. When the jury list is prepared, it is presented to the Board of County Commissioners. The names so presented are cut from this list and put in the jury box. **** No Negroes have been excluded from the grand juries because of race to his knowledge." (An affidavit of this witness introduced in evidence shows that only one Negro was on the jury panel for 1957, but when the Grand Jury was drawn this Negro did not fall upon the Grand Jury but served on the trial panel. See State Record p. 50).

Shelley Griffin, Deputy Sheriff for eight years, a policeman for six years and just elected Sheriff of Union County, testified in part: "When Court is in session, I take charge of the Courtroom. The Sheriff is there most of the time and I am

there most of the time. **** During my eight years of public service there, I have observed the trial panel and have observed Negroes serving on the trial juries. And that has been true within the past eight years. **** During my eight years I have observed Negroes on the jury panel, one or two practically every jury panel" (see State Record pp. 53, 54).

The Petitioner has offered no evidence whatsoever that there was any racial discrimination in taking the names from the tax lists and precinct lists, placing them on scrolls, putting them in the jury box, and in drawing the jury from the box. When the panel is constituted the names are cut into scrolls, placed in a hat and drawn from the hat by a child under 10-years of age. There is no doubt but what Negroes have served as jurors on many trial panels, and they served on the trial panels because they happened to be drawn for those panels by chance and were not drawn to serve on the Grand Jury, which was also by chance. Both panels are drawn from the same hat. Since the Negroes constitute only 12-1/2% of the population of the County, it is a fair inference that the percentage ratio from the tax lists would be less than 12-1/2%, and it is not astonishing when we consider this low population ratio that very few have served on a grand jury and several have appeared and served on the trial panels. Population figures with the Federal Government will show that as you go from the Seacoast of North Carolina to the mountains of the State the Negro population gradually diminishes until you arrive at a mountain county by the name of "Graham County" in which no Negroes live or reside at all.

Petitioner relies strongly on the case of EUBANKS v. STATE OF LOUISIANA, 356 U. S. 584, 2 L. ed. 2d 991, but this case is easily distinguished from our case because of the methods involved in selecting the jury. In the Eubanks case Negroes constituted about 1/3rd of the population of the parish. The method of selecting the jury is described in the Opinion of this Court as follows:

> "A jury commission is required to select, impartially, from the citizens of the Parish of Orleans having the

qualifications requisite to register as voters, the names of not less than seven hundred and fifty persons competent . . . to serve as jurors.' Twice each year the Commissioners draw the names of 75 persons from this group. The list of 75 is then submitted to one of the six judges of the local criminal court, who, in rotation, choose a new grand jury of 12 every six months. Obviously the judges have broad discretion in selecting from the list provided by the Commission. State v. Dorsey, 207 La. 928, 22 So. 2d 273. Several of them interview a substantial number of prospective jurors before making their choice. Others, including the judge who chose the jury that indicted petitioner, testified that they usually selected on the basis of personal knowledge or reputation in the community."

There was evidence in the Eubanks case that a substantial number of the Negro population in the parish were educated, registered to vote and possessed the qualifications required for jury service and that Negroes had served on the Federal Grand Juries in the parish for many years. There is no such evidence in this case. It is manifest that in the Eubanks case a great deal is left to the subjective judgment of the Jury Commission and to the judges who choose the Grand Jury from the list, whereas, in this State the jurors are drawn entirely by chance or by lot.

In PATTON v. MISSISSIPPI, 332 U. S. 463, 92 L. ed. 76, this Court said that there was an "uncontradicted showing that for 30 years or more no Negro had served as a juror in the criminal courts of Lauderdale County."

In NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074, no Negro had been called for jury service for a generation or longer, and it was further shown that there were Negroes in the County who were members of school boards, or trustees of colored schools, and were property owners and householders and eligible for jury duty

In PIERRE v. LOUISIANA, 306 U. S. 354, 83 L. ed. 757, one-half of the population from which the venire was drawn were Negroes, and a majority of the Negroes could read and

write but no Negro for a period of ten years had served on either the Grand Jury or the Trial Jury. The other cases cited on this point can also be distinguished from this case for the same reasons.

## CONCLUSION

The Respondent, State of North Carolina, therefore, contends that there is no evidence of any systematic, purposeful, arbitrary exclusion of Negroes from the Grand Jury in Union County; that, therefore, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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